APPENDIX A

STATE OF OKLAHOMA ex rel. Oklahoma Bar Association, Complainant, v. KATHERINE HINE, Respondent.

SCBD No. 4155. April 22, 1997

BAR DISCIPLINARY PROCEEDING

Although *not* an advocate for any party in a pending child-custody case, respondent corresponded *ex parte* with the trial judge regarding issues material to the matter. The Bar sought imposition of discipline. After considering the adduced evidence, the Professional Responsibility Tribunal [PRT] made findings of fact but declined (a) to fashion conclusions of law or (b) to recommend a measure of discipline. Upon this court's *de novo* consideration of the record reflecting proceedings before the PRT and of the PRT's findings of fact,

RESPONDENT IS ORDERED
DISCIPLINED BY PUBLIC REPRIMAND
AND BY IMPOSITION OF COSTS.

Janis Hubbard, Assistant General Counsel, Oklahoma Bar Association, Oklahoma City, Oklahoma, for Complainant.

Katherine Hine, Columbus, OH, Pro Se.

LAVENDER, J.: In this disciplinary proceeding against a lawyer we are called upon to decide an issue of first impression: whether a licensed practitioner *who is not an advocate for any parties* in a pending case may nonetheless communicate *ex parte* with the trial judge about issues in the matter which the court has under consideration.

I

PROCEDURAL AND FACTUAL HISTORY

In her capacity as a member of the child advocacy group, Stop Child Abuse Now [SCAN], Katherine Hine [Hine or respondent] - a licensed lawyer - was contacted by Ruth Fulton, who asked her for SCAN's help in dealing with the suspected sexual abuse of Fulton's grandson (by the child's mother and certain enately related family members). The grandson was the object of a pending child-custody suit [Perry v. Perry[1]] in the LeFlore County District Court. *Hine did not represent any parties in the case.*

After conversing with Fulton and her son, David Perry, respondent contacted Belva Brooks Barber (Mr. Perry's counsel) and asked her how the Department of Human Services had handled the inquiry into the grandson's alleged sexual abuse.

Based upon the information garnered from Fulton, Perry and the one conversation with Barber and *sans* independent investigation of the facts, respondent composed the September 21, 1995 letter which she faxed to Judge Michael Lee on September 22, 1995 - the scheduled hearing date on a motion to modify custody in the *Perry* case. The fax was on SCAN letterhead, was signed by Hine and seven other SCAN members and contained facts *material* to the case's issues[2]. Although one of the phone numbers listed on the letterhead was the

respondent's, Hine's status as a licensed lawyer was not otherwise reflected on the correspondence[3]. Respondent testified that copies of the letter were mailed to the counsel of record in *Perry* the same morning that it was sent to the judge. She also explained that she was a one-person office, did her own typing and had used addresses (from a borrowed 1993 Oklahoma Legal Directory) which, as it turned out, were not current[4]. The counsel of record in the *Perry* case testified that the *only* copy of the letter which either ever received was the one which Judge Lee provided them the morning after he received the fax.

Both Robert A. Wallace and Belva Brooks Barber filed complaints against Hine characterizing the SCAN letter as an unsolicited *ex parte* communication with the judge in a pending case. This disciplinary proceeding was then commenced by a one-count complaint - brought pursuant to Rule 6, Rules Governing Disciplinary Proceedings [RGDP], 5 O.S. 1991, Ch. 5, App. 1-A - charging Hine with violating the provisions of Rules 3.3[5], 3.5[6] , and 8.4(d)[7], Oklahoma Rules of Professional Conduct [ORPC], and Rule 1.3[8] , RGDP. After considering the adduced evidence, the Professional Responsibility Tribunal [PRT] made findings of fact but declined (a) to fashion conclusions of law or (b) to recommend a measure of discipline. In its report the PRT observed that the constitutional issue[9] raised by the respondent was beyond its purview.

II

STANDARD OF DETERMINATION IN BAR DISCIPLINARY PROCEEDINGS

The standard of determination for bar disciplinary proceedings enunciated in *State ex rel. Oklahoma Bar Association v. Todd*, 833 P2d 260 (Okla. 1992) is applicable. There the court held:

> In attorney disciplinary proceedings this Court's determinations are made *de novo*. The ultimate responsibility for deciding whether misconduct has occurred and what discipline is warranted if misconduct is found rests with us in the exercise of our exclusive original jurisdiction in bar disciplinary matters. Accordingly, neither the findings of fact of a Professional Responsibility Tribunal [PRT] nor its view of the evidence or credibility of witnesses are binding on us and recommendations of a PRT are merely advisory. (citations omitted)

Id. At 262.

In a *de novo* review, in which this court exercises its nondelegable power to regulate both the practice of law and legal practitioners,[10] a full-scale exploration of all relevant facts is mandatory.[11] To impose discipline upon a lawyer in a contested case, the charges must be proved by clear and convincing evidence.[12] *See* Rule 6.12(c), RGDP.

III

HINE'S COMMUNICATION WITH THE TRIAL JUDGE VIOLATES THE STANDARD OF PROFESSIONAL CONDUCT WHICH IS EXPECTED OF AN OFFICER OF THE COURT

The court's responsibility in a disciplinary proceeding is not to punish but to inquire into the lawyer's continued fitness, with a view to safeguarding the interests of the public, of the courts and

of the legal profession.[13] The circumstances of a lawyer's professional misconduct (*see* Rule 6[14]) are important in searching for solutions that would accord with the law's imperative of ensuring the public its due protection from substandard lawyers.[15]

The respondent would have the court focus on the fact that she sent the SCAN letter to Judge Lee in her capacity as a private citizen. Hine - though not an advocate in the cause before the district court - was nonetheless *an officer of the court.*[16] As such, she owed a special duty to the judicial system - an obligation of respect greater than that owed by other participants in the legal process.[17]

The respondent correctly argues that the rules governing *ex parte* communications *by advocates* do not apply to her.[18] The standards of practice enumerated in Rules 3.1 *et seq.*, ORPC, are designed to govern the behavior of litigants and their counsel actively involved in the legal process. Otherwise, that sections' caption, "ADVOCATE", is rendered meaningless.[19] This is not to say that lawyers - who are *non-advocates* - can interject themselves in a case pending before the district court without [sic] impunity.

Because of her license to practice law, Hine is obligated as an officer of the court not to engage in conduct that is prejudicial to the administration of justice. Rule 8.4(d), ORPC.[20] In this cause we are *not* concerned with communications to the press or other public fora. *Here the respondent communicated directly with a trial judge, sitting in a pending cause, with the intent to influence him on the proceeding's merits.*

While this court has not previously circumscribed the reach of Rule 8.4(d), ORPC, the rule's intent mandates that the respondent's conduct be assayed against a reasonable-likelihood-of-material-prejudice standard. This standard is to be applied to the facts in the statements and the circumstances under which they were made - including time, place and the respondent's justifications for the conduct. If Hine knew or should have known that there was a reasonable likelihood her actions would materially prejudice the pending adjudicative proceedings, discipline is appropriate. The standard which the court adopts today fosters and protects the State's interest in fair trial and delimits the outer contours of that conduct which - if engaged in by a licensed lawyer - would offend Rule 8.4(d).

While the SCAN letter contains speech of a mixed character,[21] the language used was published to no one other than the trial judge. Had Hine's offending speech been contained in a statement to the public media - as was the practitioner's offending conduct in *State of Oklahoma ex rel. Okla. Bar Ass'n. v. Porter*, 766 P.2d 958, 961 (Okla. 1988) or in *Gentile v. State Board of Nevada*, 501 U.S. 1030, 1034, 111 S.Ct. 2720, 2724, 115 L.Ed.2d 888 (1991) - a different test might have applied. Such is not the case. The evidence is *clear and convincing* that the SCAN letter representations were communicated directly to the trial court with the underlying intention of influencing the outcome of the Perry child-custody hearing. We express no opinion today regarding a [non-advocate] lawyer's statements about a pending case made to persons other than the presiding trial judge.

As recognized by the Court in *Gentile*, 501 U.S. at 1058, 111 S.Ct. at 2736, "the American trial remains one of the purest, most rational forums for the lawful determination of disputes." The admonition of Holmes, J., in *Patterson v. Colorado ex rel. Attorney General of Colorado*, 205 U.S. 454, 463, 27 S.Ct. 556, 558, 51

L.Ed. 879 (1907), remains sound even to this day. He stated, *"[w]hen a case is finished*, courts are subject to the same criticism as other people, but the propriety and necessity of preventing interference with the course of justice by *premature* statement, argument or intimidation hardly can be denied." [Emphasis added.] When the timing and acknowledged intent of the respondent's letter to Judge Lee in a pending case are weighed against the above standards, there is no doubt that Hine's conduct requires the imposition of discipline. As a licensed practitioner, she either knew or should have known that the facts - which she intentionally interjected into the trial process - had not been tested by being run through the gamut of the adversarial process, regardless of the court' s ultimate decision on the matter.[22] Measured at the time Hine faxed the SCAN letter to the sitting judge, there was a reasonable likelihood that her conduct would materially prejudice the child-custody hearing. The interjection of material facts into a pending adjudicative proceedings by lawyers who are non-advocates has the potential of causing a judge to recuse himself, of increasing the litigation's costs for the parties, and of affecting the advocates' representation of their clients by interfering with their trial strategies[23] - all to the prejudice of the administration of justice. Being an officer of the court demands greater respect for the integrity of the judicial process than that demonstrated by the respondent.

IV
CONCLUSION

Respondent intentionally interjected into a pending adjudicative process facts material to the issues before the court with the intent to influence the case's resolution. Although a non-advocate in the matter, as a licensed lawyer Hine had to appreciate the reasonable likelihood of prejudice tot he administration of justice which her acts would wreak. While Rules

3.1 *et seq.*, ORPC, governing the conduct of lawyers as advocates, do not apply to the respondent's conduct, Rule 8.4(d) certainly does. As a licensed practitioner and an *officer of the court*, Hine was duty-bound to avoid interjecting facts - which she knew had not been tested by the adversarial process - into a pending adjudicative proceeding.

On *de novo* review, we find the Bar's complaint that the respondent engaged in conduct which was prejudicial to the administration of justice amply supported by clear and convincing evidence. Hine's conduct calls for the imposition of discipline. To hold otherwise would be tantamount to approving a licensed lawyer's demonstrated disrespect for the adjudicative process.

In view of the respondent's altruistic motives and other mitigating evidence presented, we conclude that the imposition of a public reprimand is an appropriate disciplinary sanction in this case. Respondent is further required to pay the costs of this proceedings in the amount of $2,801.73 within thirty (30) days after this opinion becomes final.

Upon publication of this opinion in the official reporter Respondent shall stand publicly reprimanded.

LAVENDER, HODGES, SIMMS,
HARGRAVES, OPALA, WATT, JJ., concur;
KAUGER, C.J., and WILSON, J., concur in part and dissent in part;
SUMMERS, V.C.J., not participating.

1. The pending suit was Perry v. Perry, JFD-91-619. Mr. Perry was represented by Belva Brooks Barber and Mrs. Perry was represented by Robert A. Wallace.

2. The fax specifically referred to the Perry case and interjected into the hearing facts concerning the alleged sexual abuse of the boy then in his mother's custody). The correspondence questioned the Department of Human Services' response to the alleged abuse and the accuracy of the LeFlore County Child Welfare and DHS's investigations in the case. The SCAN letter also informed the court that its temporary order was being disregarded.

3. The sheet accompanying the fax also reflected the correspondent's office phone number.

4. Barber testified that while her street address had changed, during all relevant times her post office number remained the same.

5. The pertinent terms of Rule 3.3, ORPC, 5 O.S.1991, Ch. 1, App. 3-A, provide:

> (a) A lawyer shall not knowingly:
>
> (1) make a false statement of fact or law to a tribunal;
>
> *****
>
> (4) offer evidence that the lawyer knows to be false . . .

6. The pertinent terms of Rule 3.5, ORPC, 5 O.S.1991, Ch.1, App.3-A, provide:

> A lawyer shall not:
>
> (a) seek to influence a judge . . . except as permitted by law or the rules of a tribunal;
>
> (b) in an adversary proceeding, communicate or cause another to communicate as to the merits of the cause, with a judge or an official before whom the proceeding is pending except:
>
> *****
>
> (2) In writing if the lawyer promptly delivers a copy of the writing tot he opposing counsel or to the adverse party if not represented by a lawyer . . .

7. The pertinent provisions of Rule 8.4(d), ORPC, 5 O.S.1991, Ch.1, App. 3-A, are:

> It is professional misconduct for a lawyer to:
>
> (d) engage in conduct that is prejudicial to the administration of justice . . .

8. The provisions of Rule 1.3 RGDP, 5 O.S.1991, Ch. 1, App. 1-A, are:

The commission by any lawyer of any act contrary to prescribed standards of conduct, whether in the course of his professional capacity, or otherwise, which act would reasonably be found to bring discredit upon the legal profession, shall be grounds for disciplinary action, whether or not the act is a felony or misdemeanor, or a crime at all. Conviction in a criminal proceeding is not a condition precedent to the imposition of discipline.

9. Hine defended her communication with the district court judge as an exercise in freedom of expression protected by the First Amendment, U.S. CONST.

10. State ex rel. Okla. Bar Ass'n v. Raskin, 64 P.2d 262, 265 (Okla. 1982); Tweedy v. Okla. Bar Ass'n, Okla., 624 P.2d 1049, 1052 (1981).

11. State ex rel. Oklahoma Bar Association v. Dugger, 385 P.2d 486 (syllabus)(Okla. 1963).

12. State ex rel. Oklahoma Bar Association v. Miskovsky, 824 P.2d 1090, 1093 (Okla. 1991). See also in the Matter of C.G., 637 P.2d 66, 71 N. 12 (Okla. 1981), where clear and convincing evidence was defined as:

> "that measure or degree of proof which will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegation sought to be established (citations omitted)".

13. State ex rel. Okla. Bar Ass'n v. Donnelly, 848 P.2d 543, 545-46 (Okla. 1992); State ex rel. Okla. Bar Ass'n v. Colston, 777 P.2d 920, 925 (Okla. 1989); State ex rel. Okla. Bar Ass'n v. Moss, 682 P.2d 205,207 (Okla. 1983); State ex rel. Okla. Bar Ass'n v. Harlton, 669 P.2d 774, 777 (Okla. 1983); Raskin supra note 10 at 267.

14. Rule 6 (Formal Proceedings Before Supreme Court and Professional Responsibility Tribunal), Rules Governing Disciplinary Proceedings, 5 O.S. 1991, Ch.1, App. 1-A, requires the Bar to set forth in its complaint the "specific facts constituting the alleged misconduct." [Emphasis added.]

15. Donnelly, supra note 13 at 547-48.

16. Chief Justice Cardozo in Karlin v. Culkin, 162 N.E. 487, 489 (N.Y. 1928), noted that a lawyer admitted to practice "[w]as received into that ancient fellowship for something more than private gain. He became an officer of the court, and, like the court itself, an instrument or agency to

advance the ends of justice." [Emphasis added.] Of relevance also is the oft-repeated statement of Cardozo, J., that "[m]embership in the bar is a privilege burdened with conditions." In re Rouss, 221 N.Y. 81, 84, 116 N.E. 782, 783 (N.Y. 1917)

17. See State ex rel. Oklahoma Bar Assn. v. Porter, 766 P.2d 958 (Okla. 1988), where the court held:

> "A member of the legal profession is subject to reasonable restraint in his professional behavior exceeding those which exists in respect to the general public." Id. At 962 [Emphasis added.]

18. Because we hold the provisions of Rule 3.1 et seq., RGDP, do not govern the respondent's conduct as a non-advocate we need not reach the issue whether or not she mailed copies of the SCAN fax to the counsel of record in Perry.

19. Statutory language is not to be construed in a manner that would render it meaningless. See Strelecki v. Okl. Tax Com'n, 872 P.2d 910, 920 n.69 (Okla. 1995); Anderson v. O'Donoghue, 677 P.2d 648, 651 (Okla. 1983); In re Supreme Court Adjudication, Etc. 597 P.2d 1028, 1210 (Okla. 1979).

20. For the pertinent terms of Rule 8.4(d), see supra note 7. For a deeper perspective of a practitioner's obligations as an officer of the court, see Eugene R. Gaetke, "Lawyers as Officers of the Court," 42 VAND. L. REV. 39, 51-56 (1989).

21. Part of the SCAN letter is directed at the Department of Human Services and other agencies' performance and is political in character. The fax's unsubstantiated assertions that the child was sexually abused by his mother and other relatives is best characterized as hearsay concerning the fitness of Ms. Perry to retain custody and of very limited pertinence to our governmental system's operation.

22. Judge Lee testified that the SCAN letter did not prejudice his decision in the Perry case.

23. See Hearing Tr. Pp. 136-38, 146-148.

APPENDIX B

1b

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

BEFORE THE PROFESSIONAL RESPONSIBILITY TRIBUNAL

STATE OF OKLAHOMA ex rel. Oklahoma Bar Association, Complainant	)	OBAD #1240
	)	SCBD #4155
v.	)	
KATHERINE HINE, Respondent.	)	

TRIAL PANEL REPORT

This matter came on for hearing before the undersigned Trial Panel of the Professional Responsibility Tribunal ("**Trial Panel**") on the 19th day of June, 1996 pursuant to regular assignment and after notice to all and agreement of the parties. Complainant, State of Oklahoma ex rel, Oklahoma Bar Association appears by and through its Assistant General Counsel, Janis Hubbard and Respondent, Katherine Hine appears by and through her counsel of record, William Choate. Complainant and Respondent announced ready to proceed and thereupon presented their respective cases by introduction of and presentation of witnesses being first duly sworn. Subsequent to the hearing on July 1, 1996, pursuant to the Scheduling Order of April 15, 1996, the parties submitted to the Trial Panel on July 1, 1986, their respective findings of fact and conclusions of law. There were neither stipulations of fact or conclusions or[sic] law

nor a stipulation with respect to discipline. The Complainant recommends Respondent receive a public censure and the Respondent argues her actions are constitutionally protected by the First Amendment and therefore, the complaint against her should be dismissed. The Trial Panel, after taking into consideration all the above and hearing arguments and statements of Complainant and Respondent, makes the following findings of fact, conclusions of law and recommendations to the Supreme Court of the State of Oklahoma.

Findings

1. The Respondent is member of the Oklahoma Bar Association and is licensed to practice law by the Supreme Court of the State of Oklahoma. The Respondent was so licensed at all times relevant to this complaint.

2. These proceedings are begun pursuant to Rule 6, RGDP.

3. The official Oklahoma Bar Association roster address of the Respondent is: Katherine Hine, OBA #100754, 508 Crabtree, Muskogee, Oklahoma 74403.

4. The Oklahoma Rules of Professional Conduct ("**ORPC**") 5 O.S. ch. 1, app. 1-A (1995) are the standard of conduct, adopted and enforced by the Supreme Court of the State of Oklahoma, provides guidelines by which all attorneys are to practice law in Oklahoma.

5. Respondent faxed a letter concerning a case in which she was not representing either party, to Judge Michael D. Lee, the morning the case was scheduled for trial. The letter to Judge Lee was on letterhead entitled "Stop Child Abuse Now" ("**SCAN**") which contained Respondent's roster phone number, fax number and was signed by her. Respondent testified she sent the letter to counsel for the parties in the case, however, counsel for both parties testified neither one of them received such a letter from Respondent.

6. Respondent encourages lay persons to make ex parte contacts with Judges in pending matters.

7. Respondent did not conduct an investigation prior to the scan [sic] letter being faxed to Judge Lee.

8. Judge Michael Lee was not prejudiced by the **SCAN** letter.

9. Respondent had a good faith belief in the truth of the statements contained in the **SCAN** letter.

Conclusions of Law

10.The constitutional issues argued in this case are beyond the purview of the Trial Panel, *State of Oklahoma ex rel, Oklahoma Bar Association v. Porter, 766 P.2d 958, 962 (Okla 1988).*

Recommendation

The salient issue for this Trial Panel to determine is "whether the Rules of Professional Conduct ("**RPC**") apply to Respondent, who was not representing a client in the capacity of advisor, advocate, negotiator, intermediary or evaluator", but used her education and training as a lawyer, to send an unsolicited letter to a District Judge regarding a pending matter involving an allegation of child abuse in a child custody matter. At first blush, it would appear lawyers are lawyers twenty-four hours a day and therefore conclude Respondent, acting in any capacity, was and is guided by the **RPC.** However, a close reading of the **RPC** fails to support this conclusion. In addition, the Trial Panel did not find support in the American Bar Association's ("**ABA**") formal opinion 336 issued June 3, 1974, which stated "A lawyer, whether acting in his professional capacity or otherwise, is bound by applicable disciplinary rules of the Code of Professional Responsibility." (DR1-102(A); EC1-2). Even though the **ABA** has been staunch in its position that a lawyer must comply at all times with all applicable disciplinary rules of the Code of Professional

Responsibility, whether or not he's acting in a professional capacity, the Supreme Court of Oklahoma has not adopted such a position.

Therefore, since the Supreme Court of the State of Oklahoma has heretofore not addressed this issue, the Trial Panel lacks direction on what course to pursue. Additionally, the Respondent has raised certain constitutional issues which, as stated in *Porter,* are beyond the purview of the Trial Panel and must be decided by the Supreme Court. Consequently, the Trial Panel defers to the Supreme Court of the State of Oklahoma for a decision on the constitutional issues raised by Respondent and its resulting impact upon the **RPC**. The Presiding Master has been authorized to report Judge Michael Burrage and Gene Olson concur in this opinion.

/s/_____
Mark W. Dixon, Attorney Panel Member
and Presiding Master

APPENDIX C

1c

STOP CHILD ABUSE NOW
P.O. Box 2046 Muskogee, Oklahoma 74402

682-4226
686-0180 455-3851
687-1416
655-3276

September 21, 1995

Judge Michael Lee
LeFlore County Courthouse
Poteau, Oklahoma

Re: Perry vs. Perry,
LeFlore County Case No.
JFD-91-619

Dear Judge Lee:

The undersigned include but a few of the members of SCAN, an organization active in monitoring the child protection system in Northeastern Oklahoma. Our experience, like that of dozens of other grass roots groups throughout the nation with whom we network, is that the child protection system generally and usually fails abused children, and fails them miserably. Sadly, Ryan Luke was no anomaly.

Specifically, in this case, we have become alarmed about the dysfunctional role being played by the LeFlore County Child Welfare. We have become aware that the six year old boy who is the subject of this litigation, initially disclosed to the child welfare worker, Marilyn Van Bockel, that his maternal grandfather was sexually abusing him. There is evidently also a ten year old half-brother and an older boy who act out sexually in or about the maternal home, and have at times sexually abused the six year

old. It appears that typically massive efforts are being used to conceal or trivialize the involvement of the maternal grandfather, a former member of the Sheriff's office. Certainly a person's economic or political status has no probative impact as to the likelihood that he or she is a sexual offender; but such status may well impact the difficulty in rendering such person accountable for his or her acts. We recognize that making decisions that truly have the power to save a child, require an unusual degree of judicial courage and we applaud all of your efforts in this case.

Neither courage, competence, nor integrity, however, are qualities we have found demonstrated in DHS's actions in this case. Not only did the worker fail to take steps to protect the child after he disclosed abuse to her, she next attempted to contaminate the disclosure process already being handled well by trained professionals, she deliberately set up an interview between the child victim and one of the alleged perpetrators, and then enabled the alleged perpetrator to run with the child. DHS has also made no effort to date, to our knowledge, to safeguard the ten year old child still with the alleged perpetrators, still acting out, still not in therapy.

Aside from the foregoing, Judge, incredible as it seems, your very cautious temporary order in which contact with the alleged perpetrator mother was to be supervised, is being disregarded and sabotaged by those individuals at the Youth Services Center who are evidently charged with enforcing it. Our concern, of course, in cases such as this, is that the lack of supervision creates not so much an opportunity for re-molestation as it does an opportunity for subtle threats and manipulation of the very fragile, recently disclosing child, who has had a very strong, but unhealthy, bond with his abuser.

It would be wonderful if children could go through abusive childhoods and then, as adults, obtain therapy that allowed them to live normally. Unfortunately, this does not usually happen. The literature tells us that we probably have but one chance to stop this child's emerging deviance and that chance is right now, following disclosure. As a society we cannot afford the problems

we will create for tomorrow if we betray those who are helpless and crying out today.

Our concern in the above referenced litigation, as it is in all litigation involving abused children faced with court ordered re-victimization, as is being requested by the alleged perpetrators, is that the safety and well-being of the child be given highest priority. In particular, we are concerned that the best interests of the child truly be given greater weight than is any parental "right" of unsupervised access. Our experience, unfortunately, is that the "right", or more accurately, the privilege, of a parent to access is usually seen as more important than is a child's right to be safe. In this regard we feel that extraordinary attention needs to be paid to the observations and opinions of children's therapists, particularly those who have documented professional training and experience with incest and family violence, both with victims and abusers. Attached for your reference is a news article that reflects the enlightened changes in judicial attitudes toward "family reunification".

We urge you to use the utmost of caution in weighing the interests not only of this six year old boy in having a childhood free from further sexual abuse, but also the rights of the other little children in the community with whom he will be in contact, to be free from the typical sexually reactive behaviors now commonly seen on every schoolyard.

We hope to maintain a mutually supportive relationship with you as well as other members of the bench and are happy to provide current literature on virtually any topic involving family violence and custody litigation with abuse allegations. Please do not hesitate to contact us.

Sincerely,

/s/Katherine Hine
/s/Edward L. Holder
/s/Marjorie Holder
/s/Vicky Wrege
/s/Jerry Wrege
/s/Sandra Stiles
/s/Angela Conley
/s/Norman A. Sell
/s/Betty A. Black

APPENDIX D

1d

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

STATE OF OKLAHOMA, ex rel. Oklahoma Bar Association, Complainant,	)	OBAD No. 1240
v.	)	
KATHERINE HINE, Respondent.	)	

RESPONSE

COMES NOW the Respondent, Katherine Hine, and in response to the Allegations of the Complaint, respondent alleges and states as follows:

1. That respondent admits the allegations contained in paragraphs 1, 3 and 4 of the Complaint.

2. That respondent denies the allegations contained in the first sentence of paragraphs 2 of the Complaint.

3. That respondent admits the allegations contained in the first three sentences of Paragraph 5 of the Complaint and denies the allegations contained in the last sentence of paragraph 5.

4. That respondent denies having knowingly made any false statements of fact as alleged in Paragraph 6 of the Complaint, demands strict proof not only of the alleged falsity but also of respondent's alleged actual knowledge of such alleged falsity, and admits that the partially quoted phrase contained in paragraph 6 does in fact come from the letter referred to in paragraph 5 of the Complaint.

5. That respondent denies all allegations contained in Paragraph 7 of the Complaint, but admits that the partially quoted phrase contained therein does in fact come from the letter referred to in paragraph 5 of the Complaint.

6. That respondent denies all allegations contained in Paragraph 8 of the Complaint.

AFFIRMATIVE DEFENSES

1. That none of the paragraphs of County I specifies which alleged conduct is violative of which specific provision(s) of the RGDP.

2. That the Complaint is void for vagueness as it fails to specify which alleged conduct is objectionable under Rule 3.3 and also fails to specify which subdivision of Rule 3.3 respondent is being accused of violating.

3. That the Complaint wholly fails to specify what conduct it is that could arguably violate the RGDP #1.3, and respondent further states that such rule is void for vagueness and overbroad as it would purport to apply to respondent's conduct. Which conduct it is that could arguably violate Rule 1.3, and respondent further states that such rule is voids for vagueness and overbroad as it would purport to apply to respondent' conduct.

4. That paragraph 6 of the Complaint fails to make any factual averments whatever to support its conclusory language that respondent "knowingly made false statements of fact", thereby depriving respondent of her due process rights.

5. That paragraph 6 of the Complaint is unconstitutionally overbroad in that it impermissibly seeks to accuse respondent of knowingly making false statement [sic] in addition to the one contained in the partially quoted material, without ever specifying what those other statements might be. The respondent submits that she should not be required to answer allegations the nature of which is merely insinuated and not specified, and states that her rights under [sic]14th Amendment to the U.S. Constitution are violated by such practice.

6. That the allegations of paragraph 5 of the Complaint reveal that the delivery of the complained of letter was accomplished consistently with the provisions of Rule 3.5(b)(1) and is therefore not improper.

7. That respondent affirmatively avers that copies of the complained of letter were sent and were made immediately available to both counsel not only by respondent but also by the Judge and that the delivery of said letter was therefore accomplished consistently and substantially in conformity with the provisions of Rule 3.5(b)(1).

8. That the prohibitions of Rule 3.5 are not directed toward attorneys such as respondent whoa re not representing individuals with a personal stake in the litigation and that respondent's actions do not fall into any category of conduct that Rule 3.5 has ever intended to address.

9. That Rule 8.4(d) is unconstitutionally vague, vague as applied to the alleged actions of the respondent and is overbroad in that it is impossible for attorneys to assess what forms of constitutionally protected expression, if any, will be deemed acceptable, or prejudicial to the administration of justice. That complainant's attempts to subject respondent to sanctions or purported violations of Rule 8.4(d) deprives her of her rights under the First and Fourteenth Amendments to the United States Constitution.

10. That the prosecution herein of the respondent is unlawfully chilling not only of the respondent's law reform activities protected under RPC #6.3 and the U.S. Constitution but also of the constitutionally protected free expression right of other members and potential members of the organization SCAN and other law reform citizen groups who may have attorney spokespersons, and of attorneys who might otherwise be spokespersons for such groups.

11. That the complainant is attempting to sanction respondent for acting in accordance with the highest ethical principles, i.e., those set forth in EC 9-1, as the complained of letter was an attempt to assure that judicial decisions profoundly affecting the safety of a

child would be based on more unbiased and scientific information than that normally made available by attorneys for the battling parents.

12. That complainant's actions if upheld, constitute an unlawful and dangerous attempt to place a ban not only on the tradition of amicus curiae participation in litigation of public interest, but also a ban and prior restraint even upon preliminary efforts of citizen [sic] to obtain judicial permission to appear as amicus curiae. That such action colorably under State law cannot be tolerated in a free society.

Respectfully submitted,

KATHERINE HINE, OBA 10075
Attorney at Law
508 Crabtree
Muskogee, Oklahoma 74403

APPENDIX E

1e

June 19, 1996 Transcript, pp. 189-200
Cross-Examination of Judge
Michael D. Lee

Q. Yes, Judge, I'm Katherine Hine. I'm the one that was objecting earlier. Let me ask you this: Have we ever met, to your knowledge?

A. To my knowledge, no, we have not.

Q. Okay. So that would mean I've never practiced law before you?

A. Not that I can - - No, I don't think so.

Q. Okay. I take it from your testimony that I have essentially no credibility with you; would that be fair?

A. I'm not sure I understand the question.

Q. Just because I say something is true, doesn't hold any particular sway with you, does it?

A. That doesn't mean I think it's true or untrue.

Q. Right. Not one way or the other.

A. Right.

Q. And you had no reason particularly just because I signed my name to a letter to be - - to believe that what was in there was especially true or not true?

A. No, I didn't.

Q. Okay. Same question as to the other signers. Just because they signed, you didn't have any reason to have any particular weight to the letter because of a particular signature on that letter.

A. The weight has several meanings. As far as whoever's signature was on there, as far as whether I believed it or not, no that doesn't make any difference. The fact that it had your signature and you were a lawyer bothered me immensely.

Q. Initially, you didn't like the letter, you thought that the letter was improper, and that occurred before you knew that any of the

signatories were - - that I was one of the signatories and that I was an attorney?

A. That's right, yes.

Q. Okay. The letter had a third page which was a copy of a newspaper article?

A. Yes, uh-huh.

Q. Okay. Any anything about that that bothered you?

A. I can't really say anything about that bothered me.

Q. Okay. Do you know Judge Taylor that was referred to in that newspaper article?

A. Yes, I do.

Q. Okay. But that didn't unduly influence you?

A. No, huh-uh.

Q. Okay. I take it that - -

A. I agree with Judge Taylor on some things and disagree with him on some things.

Q. Okay. I take it you didn't find out that I was a lawyer until Belva Barber indicated that; is that correct?

A. I don't recall her saying anything about it.

Q. But - - Do you have the letter in front of you by any chance now?

A. Yes. Uh-huh.

Q. Okay. Is there anything in the letter that would have indicated or any representation that I was a lawyer in the letter?

A. No. No. There is not.

Q. Were there any efforts to make a determination if any of the other signers were lawyers?

A. Yes. Yes. I have a computer program that you can run phone numbers, you run names, find out people's addresses, so forth. And I checked all of these names and all the phone numbers on the first page.

Q. Okay. So then, did you determine who these people were?

A. I determined that one of them lives down here in Wister. One

of the phone numbers is a Wister phone number.

Q. Which one would that have been?

A. Oh, right offhand, I really don't remember. I didn't make any notes.

Q. Are you referring to one of the phone numbers at the top of the letter is a Wister phone number?

A. Yes.

Q. Okay. But, none of the individuals who signed were residents of LeFlore County at all, were they?

A. Not that I recall. I really don't remember that.

Q. Okay. Were there any efforts taken that you are aware of to take any legal action against the other individuals because of the letter?

A. Not that I'm aware of, no.

Q. Do you feel like that something like that might be appropriate?

MS. HUBBARD: Your Honor, I'm going to object. I don't believe that that's a relevant question.

MS. HINE: Well, it goes toward an equal protection argument. It goes toward whether something that is proper by one person may be improper by someone who has a law degree, who has a license to practice law, but is not acting as an attorney in the case.

MS. HUBBARD: That's certainly something that she can argue. But as far as asking this particular witness, who happens to be the judge in the matter, I think it's inappropriate.

MR. DIXON: Judge, I'm going to sustain the objection. You don't have to answer it.

THE WITNESS: All right.

Q. I can't remember. Was it your testimony that you did become upset around the same time that the lawyers did?

A. Yes. I became upset in that it bothered me that someone would attempt to influence me. I didn't get visibly upset like they did. They got very angry.

Q. Okay. And of course, you read the letter a little bit before they did to yourself, correct?

A. That's correct.

Q. So you had an opportunity to react a little quicker?

A. Yes.

Q. I take it as a judge you have occasion to rule on suppressions of evidence and have in front of you various items of inadmissible evidence, and then go on and decide the merits of a case, do you not?

MS. HUBBARD: I'm going to object, Your Honor. I don't know how that question is relevant to the Bar Association's grievance today.

MS. HINE: This issue has come up before in that the nature of the letter contains admissible evidence, and there are - - there is case law to the effect that that is one of the factors to be considered in deciding about prejudice. If the content of a news flash or a communication to a judge is admissible evidence, that is one of several factors to be considered. I'd like to have the factual issue on that resolved.

MS. HUBBARD: What prejudice are we talking about?

MS. HINE: 8.4(d), and 3.3(a)

MS. HUBBARD: Your Honor, I'm not sure that the prejudice that she is referring to is what is required by the rules she just stated.

MS. HINE: We are talking about undue influence here. It becomes substantially less undue influence if we're talking about matters that could be heard by the Court in any event that is admissible evidence.

MR. DIXON: I'm going to overrule the objection.

You can answer the question, Judge.

THE WITNESS: All right. The answer is yes, I have had to rule on admissibility of evidence and so forth.

Q. You have had prejudicial evidence in front of you that was inadmissible and then you have gone ahead and ruled on the merits?

A. Yes.

Q. Have you ever before the SCAN letter gotten letters from the public about a case?

A. Not before the fact, no.

Q. You never have?

A. I haven't.

Q. You have been on the bench how long now?

A. Since 1984. 12 years.

Q. And you have never gotten letters regarding - - right before you were going to sentence somebody in a criminal case?

A. Well, yes, I've got letters like that.

Q. Okay. You've gotten letters from prisoners?

A. Yes, uh-huh.

Q. Okay. Have you got impolite letters from the public?

A. I got a very impolite letter one time after I set a bond on a guy.

Q. Okay. Have you gotten angry letters from the public?

A. Yes.

Q. Have you gotten letters from people expressing their personal philosophies?

A. Most of those were after I had made rulings, though; except, like you say, prisoner letters and those kinds of things.

Q. Okay. Have you gotten letters from folks claiming friendship in high places?

A. I don't think so.

Q. Just one last question like that. Have you gotten letters from people claiming to be LeFlore Country voters?

A. No. But I've had comments made. I tell them I don't run for election.

Q. In fact, because you are a special district judge, would it be true that you serve at the pleasure of the district court judge?

A. I think the statute says district judges.

Q. Okay. So you are sort of insulated from - - from public - from rabble-rousing kinds of activities; would that be fair to say?

A. Yes. In a way, yes.

Q. Was there any possibility that Perry versus Perry would have become a jury issue?

A. Only if there had been some kind of contempt matter filed.

Q. Okay. And to your knowledge, was the letter made public at all, like to the newspaper to where it could have contaminated a jury panel?

A. Not that I'm aware of, no.

Q. You did order supervised visitation in August of '95; is that correct?

A. Yes.

Q. If supervision fails for some reason, would that be something that you would want to know about?

A. Yes.

Q. Okay. Do you generally agree that it is up to courts to safeguard the interests of children, particularly in cases that come through the courts?

MS. HUBBARD: Your Honor, I'm going to object, again, as to the relevance of what the line of questioning that she's going down.

MS.HINE: The relevance is there are also in the Rules of Professional Responsibility - - Professional Conduct rules that require certain actions to be taken by lawyers, such as their ethical

considerations. The comments to Rule 8.2 talk about helping insulate judges from unwarranted criticism, they talk about helping judges to arrive at informed decisions. That's in 3.3(d).

If that applies, which I have an argument on that, and there is also Rule 3.6's safe harbor provision that would allow certain disclosures even to the news media.

MR. DIXON: Judge, I'm going to go ahead and overrule the objection. You can answer it.

WITNESS: All right. Yes, I think judges have a statutory duty to protect the children. Look out for the best interest of the children.

Q. Do you think that the interest of a child in being free from abuse is a liberty interest?

A. What about those terms.

Q. I'm talking about something that is constitutionally protected.

A. I would have to think on that. That in those exact terms has never been raised to me before.

Q. Do you think that a good faith argument could be made that it is?

A. Possibly, yes.

Q. Do you agree that it generally takes adults to protect children from abuse? They can't protect themselves?

A. Well, not properly. They want to defend themselves if there is no adult there.

Q. Were you prejudiced by the SCAN letter?

A. I don't think so.

Q. Was an attorney appointed in the Perry versus Perry case specifically for the child?

MR. DIXON: Judge, are you still there?

THE WITNESS: Yes. Yes, I am.

MR. DIXON: Did you hear the question?
THE WITNESS: The last question I heard, was there an attorney specifically appointed for the child?
MR. DIXON: We didn't hear your response.
THE W ITNESS: I said no, there was not.

Q. Was there a guardian ad litem or a causa [sic] - -
A. No, there was not.

MS. HINE: I have nothing further.
MR. DIXON: Anything further?
MS. HUBBARD: No, Your Honor.

* * * * * * * * * * * *

June 19, 1996 Transcript, pp. 293-298
Direct examination of Dianna Carroll

Q. Would you state your name for the record, please?
A. Dianna Carroll.
Q. And you reside in what city?
A. I reside in Oklahoma City.
Q. Okay. And are you a member of certain organizations that deal with child protection?
A. Yes, I have been.
Q. Okay. What are those organizations? If you will speak up. I think we're having a little trouble with ventilation system hearing everybody.
A. MASA, Parents Alliance.
Q. Are you also a member of the State Post-Adjudication Review Board?

A. I've been nominated for the State Post-Adjudication Review Board, and turned down a nomination.

Q. Okay. Who is on that?

A. The State Post-Adjudication Review Board?

Q. Yes.

A. There is several judges, approximately three or four laypeople and the current chair is Maxwell Pembrook from Warwick, Pat Lowery.

Q. Who nominates you for that?

A. The State Commission on Child and Youth Services actually nominated me.

Q. And you have received special training in areas that touch on child abuse issues. What is that training?

A. I was trained in Washington, D.C., several times, during the Washington D.C. law enforcement conference, juvenile justice center there. I've been trained in formal education. I've been trained by various other avenues including law people, law enforcement.

Q. You are in the process of finishing a master's degree in what areas?

A. In psychology and criminal justice.

Q. Okay. And are you nearing completion of research on the issue of children, abused, children in Oklahoma and how they are dealt with in the child protection system?

A. Yes. This is a four-year research program, study, put together over 400 children, statewide. And it came out to eight areas where children fall through the cracks in the system.

Q. And is that study to be published in the fall?

A. Yes, it is.

Q. You have received a national award?

A. Yes. I received a national award in 1993 for my work in the field of child intervention, child abuse, by Marilyn Berringer Atler Foundation in L.A.

Q. And what is MASA that you mentioned that was one of the groups you were affiliated with?

A. MASA is a national organization that's called Mothers Against Sexual Abuse. They have over 21 states, and I was the chapter executive director for Oklahoma until '94.
Q. Okay. In your capacity, working with MASA, have you also become familiar with the activities of other child protection groups?
A. Yes.
Q. Okay. Are you familiar with the problems that the child protection groups have?
A. Yes, I am.
Q. Okay. You've been working in child protection with child advocacy groups for approximately how long?
A. Since 1989.
Q. Okay. Are some of the groups that you are affiliated with, do they have attorney participation?
A. Yes.
Q. Okay. Are some of the groups that you either network with or are affiliated with, do they lack attorney participation?
A. Yes.
Q. Okay. Is there a difference in how the two types of groups can function for certain children?
A. Yes. The organizations like the Child Advocacy Center here, Jill Carson is a member of, is a much more functional, they have more power to get things accomplished, than the ones who are able to have attorney participation. Because many times, unless someone like I have been - - who is trained in the legal system and networks in the legal system or law enforcement, they - -
Q. I'm sorry?
A. They hit a brick wall. They have no way to actually have participation that may be necessary concerning children.
Q. Is raising the consciousness of the general public about issues of child abuse part of a typical mission of most child advocacy groups?
A. Yes.
Q. Okay. How would attorney participation hinge on that, if it would?

A. Attorney participation can consist of many things, which is providing information to the groups as to what their restrictions or guidelines are. They can also guide us in how to contact the appropriate people and provide the appropriate information to whom.
Q. Are there difficulties that groups - - the child protection groups have in obtaining attorney participation?
A. Yes.
Q. If so, what is that difficulty?
A. The - - I'm going to give some very candid information here. The truth is it 's very hard when attorneys get involved with any type of child advocacy group or children's issues, even if they're not involved with the group. They come under fire very frequently. We have attorneys holding seminars on how to defend a pedophile, which includes how to dissect the child on the stand. And nobody touches them with a ten-foot pole. However, if someone tries to come forward in behalf of children, they get their hands slapped, forewarned. It's just not worth it.

It can hurt many other things, reputation among the Bar, among the people of their own career field. It's just one of those things that they don't do. It's a no-no.
Q. Have you had specific experiences in which attorneys have refused to participate in child advocacy because of their fear of sanctions?
A. Yes.
MS. HINE: Nothing further.

June 19, 1996 Transcript, pp. 314-316, pp. 321-323, Direct examination of Linda Palmer

Q. And during the course of providing therapy, did information come to you regarding the interviewing that was done of the child by DHS which concerned you?
A. Yes.
Q. Okay. What was that?

A. The father told me that he was very concerned that the DHS worker had taken the child and interviewed - - the child had told me, and he had told his physician, that he had been molested on one occasion by his mother, that she had stuck her finger up his rectum. Of course, that's not the word he used. He used child's terminology.

And he had not initially told DHS that they were the first people to interview him, but he had told, like I said, first the physician and then I was the third person that interviewed him and he told me. It was spontaneous. He told me.

I was talking with DHS and letting them know that I had interviewed the child and what my findings were, because they had called. We were comparing notes. And Ms. Van Bockel, I think her name was, had indicated the child had not told her that his mother had molested him. And so she says, I'm going to re-interview him.

Well, she did so, but she did so with him sitting on his mother's lap. And he recanted. And that is entirely outside the guidelines of APSAC. I just can't imagine. That is just not good practice.

And the father was very upset about this, and I concurred that it was uncouth, it was not clinically correct, and had probably damaged the child.

Q. When the child would come to you, did he vocalize about his feelings about the DHS worker"

A. Yes. He kept asking me if she was there. I had to reassure him like or [sic] two or three visits afterwards that she wasn't there, that she wasn't going to be there. Finally I just asked him, what is the deal with this?

Q. Is it unusual for a child who's been interviewed about sexual abuse, by a DHS worker, to then develop; kind of a phobia about that worker? Have you seen that before?

A. No. That's the first time. In fact, they usually consider the DHS worker a friend, an ally, for the most part.

Q. That was an unusual experience for you to see?

A. Yes.

Q. Okay. Following the Court's allowance of supervised visitation to the mother in the Perry case, did you continue to see the child and did you notice that anything about the child or his disclosures changed after the supervised visitation went into effect?
A. Well, at one point, he said that his mother and brother had not molested him, and he became more reticent about talking about it. And he finally just said, my mother told me not to say this anymore, that I need to quit talking.
Q. And do you feel like that that's damaging to him?
A. It was. It made him feel very guilty at the time. . . .

* * * * * * * * * * * * * * *

Q. Looking at the third paragraph of the letter, is there any - - as to those allegations, do you have an opinion as to whether or not there is - - there was grounds to believe that those statements at the time they were made were accurate?
A. I think that DHS's actions in this were at best - - when they interviewed the child, in my opinion, they were at best incompetent, and at worst perhaps bowing to political pressure. I don't know.

It just wasn't - - It just wasn't standard clinical practice to ask a child, while sitting on his mother's lap, if she'd molested him. That's not ever common sense.
Q. Calling your attention to the last paragraph on the first page, the allegations that are contained in that. at the time they were made, were you aware of whether or not there was reason to believe that those statements were accurate?
Mr. Perry had called and he was very upset because Youth Services was allowing the mother to go into a closed room with the child, while we had this ongoing court case, and visit with him without anyone even being able to see them. And he had protested, and his statement to me was that they had told him that they could not interfere with the visitation process.
Q. Whatever they did, would that fairly fall under the term "supervised visitation" as you understand it to be?

A. No. They couldn't even see him, much less they couldn't hear, you know.

June 19, 1996 Transcript, pp. 217-218
& pp. 224-227, partial direct examination
of petitioner

Q. That's true. I just want to make sure that that's what you have reference to when you say you had some background for preparing the letter of 22nd of September. Is this part of what influenced you in that preparation of the letter of 22 of September?
A. Yes; but not in the way you might intend. We get a lot of information, like I said, from a lot of different groups.

Respondent's Exhibits 4, 5, and 6 come from three different organizations, and I think it's pretty clear which organizations from the exhibits.

I would say that those represent a very extreme position that certain child advocacy groups have taken towards judges who decide post-divorce child custody cases.

In the sense that I am very concerned about the very extremeness of the positions taken in these articles, I can say that that influenced my preparing the SCAN letter, because I wanted to be of assistance to a judge in such a case in helping him to make an informed decision that would not open itself up to the kind of criticisms that are found in 4, 5, and 6.
Q. In other words, you are trying to assist the Court rather than be party to disrupting the Court?
A. I was not attempting to influence the Court to make a decision one way or the other. I was assisting the Court to simply be aware of certain information that I had which clearly was not two-sided because I did not have the benefit of both sides. I had some information. And I felt that if I did not present it, it very easily could -- might be overlooked, and should not be in the interest of the child.

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Q. But as far as an outcome in this particular case, what was your objective?
A. There was no specific outcome that I was looking to. I was concerned about the welfare of the child. I was concerned that the knowledge - - that the information that was out there and available be looked at.

I'm also concerned about false allegations. I'm also concerned about supervision for the protection of the person that's supposed to be the danger to the child, because I think it protects there, too. I was concerned about that. And concerned that there would be a free flow of information about that.
Q. Well, did you attempt to let the Court know in that - - in that letter, that there were other interests besides this particular child?
A. Those were my concerns as well as this particular child, and that is - - that other cases in that county have potential of being mishandled. Other children perhaps would be subjected to improper interviewing techniques. If this can happen in one case, it could happen in many others. I was very concerned about that and felt that that should be brought to the attention of the person who was in a position to do something about it.
Q. Okay. Now, it does say in two places except as permitted by law or others authorized by law. What authorization by law or acceptance by law were you relying on?
A. Ethical consideration 9.1 dictates that a lawyer should promote public confidence in our legal system and in the legal profession. I was very concerned about the growing hostility, if you will, of the public toward the bench. I think we've seen a lot of that just from the O.J. Simpson trial.

I mean, it's just - - it's a subject that the Bar has addressed in our journals. It concerned me. It concerned me that certainly the issue of judicial training is a very hot issue and has been address by our Legislature, and I wanted to see that this particular judge would not be a sitting duck for those kinds of attacks.
Q. Is the subject of child abuse and referral a specific topic of statutes - -

A. I definitely felt that this was a child abuse reporting issue. Although that statute may refer to reporting to DHS, and I was aware that a report had already been made to DHS, and perhaps there was going to be another, as a result of my conversation with Belva Barber, another report to OCCY which is supposed to be the watchdog group over DHS appointed by the Governor. They have no enforcement powers.

There was really the only logical choice to oversee a malfunction in DHS would have been a sitting judge in that county. In particular in a case in which the malfunction was occurring or could have been occurring.

Transcript of June 19, 1996, pp. 343-353
Petitioner's argument to Trial Panel

I would refer the Court to the language that the Oklahoma Supreme Court has used in the 1988 decision of OBA versus Porter, which also dealt with some free speech issues. It definitely dealt with attorney speech, although it was in the context of a newspaper. A black attorney referred to a federal district judge, in the newspaper, as being a racist.

The Oklahoma Supreme Court declined to censure him in any way. And stated - - and this I think is a guideline for this Panel - - "This court has always looked at the nature of the accusation and has carefully avoided censuring attorneys for speech in the absence of a showing of falsity." And I think the rule - - in fact, even the language that the Complainant uses in the complaint makes it clear that falsity in and of itself is not sufficient; knowing falsity is. And there's been a complete absence of proof in that regard.

The factual allegations in the letter, as the evidence shows, are true. There was every reason in good faith to believe that there was evidence supporting them. Complainant and its witnesses were evidently not of the same mind as to the generally accepted meaning of the term "supervised visitation" as is typical

in this complaint. In this case, Complainant wants you to believe that where there is a dispute, that the OBA - - the OBA's version is the preferred version. That simply is not the case, as earnest as they may be in their belief.

In referring to the contents of the speech, the Complainant says that the content of the speech is irrelevant, that the Constitution awards protection or denies protection to political speech, which is defined in the decision of Gentile versus Nevada State Bar to be basically speech that criticizes government, which this was; that that sort of speech stands on the same constitutional footing as, for example, the speech in - - I believe it's the lawyer advertising case, the Bates case, commercial speech. And of course they do not.

Even commercial speech, though, in the Bates case is protected and is entitled to constitutional protections under the First Amendment. To a large degree, the reasoning in that court was that lawyer advertising could not be sanctioned because by sanctioning it, there was a restriction of the public access to the courts or to government for redress of grievances.

But the decision in Gentile is clear that speech such as that which is contained in the letter has traditionally been recognized as lying at the core of the First Amendment, according to Justice Kennedy's decision.

The Oklahoma Supreme Court, again in the Porter decision, and also referring to the United States Supreme Court decision of New York Times versus Sullivan, says that, "Sullivan and its progeny places rather less stress on the social utility of shielding a public official from criticism and more emphasis upon preservation of the integrity of the institution, rather than the personality occupying that office."

In Gentile, the Court recognized the criminal defense attorney's statements in the press accusing government agents of criminal activity was protected as political speech.

Surely, in commenting that it is hard to imagine an issue that has higher - - well, what Porter says is, "Plainly it would be

difficult - - this is quoting newspapers - - "it would be difficult to single out any aspect of government of higher concern or importance to the people than the manner in which criminal trials are conducted in." That case, of course, there was a danger of pretrial publicity affecting a jury. People who were not trained to disregard inadmissible evidence.

And I would say that there are a lot higher priorities than how we conduct criminal trials. If ever there was one, it's how we protect our children, our future.

The rule that prohibits conduct that is prejudicial to the administration of justice, 8.4(d) does not punish an attempt, which I don't think the evidence justifies that there was an attempt to prejudice the administration of justice. But if so, it would be constitution - unconstitutionally overbroad because it's so vague. It does not specify what type of conduct prejudices the administration of justice, particularly as here, where there's a judicial finding of no prejudice. Judge Lee told us he was not prejudiced. And it's overbroad as applied to nonadvocate attorneys, such as the position that I was in in that case, because - - there is a strong policy reason for that.

When we have nonadvocate attorneys, we don't have the credibility or the inflated credibility of someone who is an actual lawyer in the case, making a newspaper statement, I know this and I know that, because I'm privy to inside information, because a nonlawyer - - even a lawyer who was acting as a nonlawyer and has no insight [sic] information because of not representing the litigant is not in the position. And clearly Judge' Lee's testimony also supported that there was no particular undue influence remotely possible because there was no - - there was no personal - - there was no particular credibility on the part of any of the signers of the letter.

If there had been a danger of unfair influence, one would think that the motion to disqualify would have included that. One would think that the judge, sua sponte, would have responded to that. That did not happen. There are very sound reasons for that.

We have traditionally expected judges to be resilient from all sorts of influences that they may be subject to, and I enumerated a number of communications, letters, that this particular judge, as all judges do receive all kinds of letters, some polite and some not so polite. But they're trained to disregard that.

And there is also some authority, I won't go into detail on that, but that is bench trials, in fact, I think it's the Hirschkof [sic] case from the Fourth Circuit that indicates that the 8.4(d) type of rule is not applicable when you are dealing with bench trials. The prejudicial to the administration of justice is really intended for pretrial publicity, before a jury trial.

In connection with that, I think the rules have got to be read together and Rule 3.6, the safe harbor portion of Rule 3.6 says that a lawyer may state without elaboration a warning of danger concerning the behavior of a person involved when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest. That's what Gentile calls the safe harbor provision of the pretrial publicity rule. The purpose of it is to take away the vagueness problem.

The first part of the rule talks about one, two, three or however many there are, these are the kinds of pretrial statements we don't want to see attorney speech in this area because it carries almost a presumption of being prejudicial.

Next, you go down to the safe harbor provisions, and it says look - - and the Gentile decision said if that attorney arguably fits his conduct under the safe harbor provision, then he has a right to expect that he will not be censured for his speech, that - his political speech.

It can hardly be said that if the right exists to publish what was in the SCAN letter in the newspaper, that the SCAN letter cannot constitutionally find its way to the judge.

One of the comments to Rule 8.2 states lawyers are encouraged to continue traditional efforts to defend judge who are unjustly criticized. And there is similar language in ethical consideration, I think it's 9.1 about helping judges and also the

requirements of the 3.3(d) that talk about giving material facts and so forth to judges.

The argument is Rule 3 doesn't apply, any of Rule 3 doesn't apply. But if it applies, in the context of 3.5(e), then it sure applies in the context of an obligation under 3.3(d).

3.3 - - 5, if it were found to apply to a nonadvocate, which there is no authority, case law or otherwise to suggest that, if you look at the comments, it's clear, it's not intended to so apply. The language of it talks about opposing counsel. But it if did, the rule does not specify making delivery by certified mail.

I certainly testified about mailing. I cannot absolutely prove that I mailed it, but my testimony is controverted by circumstantial evidence from the witnesses that they did not receive the copies of the letter.

You're going to have to look at whether or not we can base discipline on whether or not there has been a failure to perform a futile act when it bears on First Amendment issues.

I think there is also a substantial issue as to reporting of abuse. And abuse can consist of a gross disregard for the investigation of child abuse.

I'm getting close to the end here.

In language that strongly foreshadows the reasoning of the United States Supreme Court in Gentile versus Nevada, which came in 1991, Oklahoma Supreme Court Justice Hargrave went on to say, "There is practically universal agreement that a major purpose of the First Amendment is to protect the free discussion of governmental affairs." And that, of course, is referring to attorneys' speech.

He quotes - - also quotes Thornhill versus Alabama, "The freedom of speech in the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment."

Attorney Porter's speech, which consisted of telling the newspapers that a federal judge was a racist was, quoting the opinion, "plainly at the center of the protective umbrella of the First

Amendment." "Freedom of speech," quoting from the opinion "press, assembly, the right to petition the government for a redress of grievances, share a common core purpose of ensuring freedom of communication on matters relating to the function of government."

Who else but Judge Lee could have been petitioned to effectively redress grievances about how the government of LeFlore County, the child welfare function, when it came to the welfare of that county's youngest and most vulnerable citizens?

APPENDIX F

1f

Petitioner's Brief to
the Oklahoma Supreme
Court, pp. 18-29

PROPOSITION III: COMPLAINANT FAILED TO PROVE BY CLEAR AND CONVINCING EVIDENCE, CONSISTENT WITH THE FIRST AMENDMENT, THAT RESPONDENT VIOLATED RULE 8.4(D)

Oklahoma's Rule 8.4(d) prohibits a lawyer from engaging "in conduct that is prejudicial to the administration of justice." There are very few guidelines as to what may be considered "prejudicial" other than prejudicial to the trial process. As Rule 8.4(d) requires that the conduct actually "is prejudicial", it would seem to be a fairly cut and dried conclusion that respondent's letter absolutely did not prejudice the trial process in Perry v. Perry, especially in light of the uncontroverted and well supported Trial Panel finding that there was no prejudice.

Many of the First Amendment cases dealing with lawyer speech, such as Porter and Gentile concern themselves with lawyer discipline arising from statements made to the press. In the Porter case the statements were critical of a federal district judge. In Gentile the statements were critical of the police department. Although complainant has continued in its brief to make unsupported and patently erroneous statements such as the assertion that respondent thought the SCAN letter was critical of judges (Brief, p. 21), it is not the judiciary, but rather the LeFlore County Child Welfare that the letter criticizes. Nowhere in the transcript does respondent refer to the content of the letter as "commercial speech", although complainant so states (Brief, p. 23). Despite the fact that respondent did not criticize judges, did not speak to the news media, and did not engage in commercial

speech, she submits that she is as protected by the First Amendment as were the lawyers being targeted for discipline in Porter, Gentile, and Bates v. State Bar of Arizona, 433 U.S. 350 (1977). Actually, more so.

Justice Kennedy's majority opinion in Gentile, at pp. 1034-1035, expresses concern over efforts of the Nevada State Bar to discipline attorney Gentile who was

> "engaged not in sdicitation of clients or advertising for his practice, as in our precedents from which some of our colleagues would discern a standard of diminished First Amendment protection. His words were directed at public officials and their conduct in office. There is no questkn that speech critical of the exercise of the Stae's power lies at the very center of the First Amendment. Nevada seeks to punish the dissemination of information relating to alleged governmental misconduct . . ." (Emphasis supplied)

Complainant's outrage that respondent brought to the attention of the Court "certain information" that one of the attorneys wished to have concealed (Tr. Pp. 161-163) is expressed in its brief (pp. 25-26) Clearly, the "certain information" pertained to the alleged misconduct of DHS or of Youth Services, misconduct evidently accepted in LeFlore County as the norm, but about which Judge Lee had as much right to hear, as respondent had to speak. Va. Pharmacy Bd. V. Va. Consumer Council, 425 U.S. 748 (1976).

The Gentile Court expressed a concern that there be contemporaneous publicity about criminal trials as an "effective restraint on possible abuse of judicial power" citing In re Oliver, 333 U.S. 257, 270-271 (1948) The Gentile Court also noted that the manner in which criminal trialsare conducted is of great

significant [sic] to the public, citing Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 575 (1980). Respondent submits that the manner in which government protects (or fails to protect) its children is a matter of even graver public concern than is local criminal procedure.

Complainant harps in its brief about the timing of respondent's communication to Judge Lee. Yet the U.S. Supreme Court in Bridges v. California, 314 U.S. 252, 268-269 (1941) remarked that comment about pending cases is very

> "likely to fall not only at a crucial time but upon the most important topics of discussion . . . No suggestion can be found in the Constitution that the freedom there guaranteed for speech and the press bears an inverse ratio to the timeliness and importance of the ideas seeking expression."

In referring to N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964) this Court in deciding Porter stated that a case such as Sullivan or any of its progeny

> "places rather less stress upon the social utility of shielding a public official from criticism . . . and more emphasis upon preservation of the integrity of the institution rather than the personality occupying that office." Porter at p. 965.

Complainant cites no cases in which lawyer extra-judicial speech protected by the First Amendment becomes unprotected if the speech merely reaches the particular judge, rather than the general public or a potential jury venire. Porter notes the

> "practically universal agreement that a major purpose of the First Amendment is to protect the free discussion of governmental affairs."

Porter at p. 966.

and the traditionally accepted view that lawyers are free to criticize rules of law without being deemed to have made an attack on the integrity of a particular judge or of the legal system. Porter at p. 965. Allowing discipline of such lawyers not only abridges the individual lawyer's First Amendment rights but also the rights of others who are thereby prevented from receiving information about the workings of their government form a speaker so situated as to be intimately familiar with the operation of the judicial branch of government. Porter at p. 968l. Part of these cherished First Amendment rights, as noted by Porter at p. 967 is the "right to petition the government for a redress of grievances".

As in other contexts, the First Amendment right of an attorney to speak freely (and critically) about governmental misconduct can run into conflict with other rights of equal stature, specifically those of the Sixth Amendment and its guarantee of a fair trail. Clearly in the case at bar, and as specifically found by the Trial Panel, there was no actual interference with or prejudice to the administration of justice. (Tr. Pp. 53-59, p. 200) Using the analyses of Porter and Gentile, whether the language is couched in terms of "substantial likelihood of material prejudice" or "clear and present danger", which have been termed "linguistic equivalents" in In re Hinds, 449 A2d 483 (N.J. 1982) complainant has produced no evidence to support an inference that the SCAN letter at any time posed such a danger to the administration of justice. Gentile and most other attorney speech cases that consider possible potential prejudice to the trial process involve criminal jury trial situations.

Respondent's research has revealed that there are a number of significant factors bearing on whether courts have protected attorney speech under the First amendment where the body seeking to impose discipline claims a prejudice to a specific trial process or to the administration of justice generally. Before

considering those factors it is important to reflect that respondent is not a second class citizen due to being a lawyer and has First Amendment rights of free speech. Hirschkop v. Snead, 594 F2d 356 (4th Cir. 1979). Rather than enjoying the usual presumption in favor of constitutionality, there is a presumption against the constitutionality of government rules such as Rule 8.4(d), to the extent that they tend to chip away at fundamental free expression rights. See cases cited at 16 C.J..S. Sec. 106. Although complainant argues that 8.4(d) usually withstands vagueness challenges, the caselaw cited by complainant (Brief, p. 16) contains no cases in which lawyer discipline was imposed under 8.4(d) where there were First Amendment issues. Hence complainant bears the burden not only of showing that Rule 8.4(d) applies factually to respondent's conduct, but also the burden of justifying the constitutional validity of imposing the rule, as by demonstrating a compelling state interest. The factors to be considered include the following:

1. Whether the attorney is an advocate in the case

In considering whether an attorney communication is likely to unduly influence a tribunal, one factor considered by courts is whether the attorney is in a position to appear to have insider information about a particular case, as would be the case if he or she were representing a party. E.G. Chicago Council of Lawyers v. Bauer, 522 F2d 242, Hdnt. 15 (7th Cir. 1975) (Disciplinary rule creating presumption attorney speech threatened trial process only applicable to attorney associated with government investigation.)

Non-lawyers and lawyers not representing litigants are generally given the benefit of the "clear and present danger" standard when sanctions are leveled at their public criticisms of the judiciary. See Wood v. Georgia, 370 U.S. 375 (1962) and ftnt. 5 at p. 1072 of Gentile.

Despite complainant's urgings (Brief, p. 19), the concept that lawyers are considered credible in regard to the legal system does not tend to establish that their speech is prejudicial to the administration of justice.

> "If the dangers of their speech arise from its persuasiveness, from their ability to explain judicial proceedings, or form the likelihood the speech will be believed, these are not the sort of dangers that can validate restrictions. The First Amendment does not permit suppression of speech because of its power to command assent. (Gentile at p. 1057)(Emphasis supplied)

2. Whether the possible prejudice is to a bench or jury trial

In Hirschkop v. Snead, 594 F2d 356 (4th Cir. 1979) the Court explains the different considerations operating in a bench trial:

> "Judges necessarily must consider evidence that has no direct bearing on the guilt or innocence of the accused. They must determine whether to suppress confessions and other evidence. When this evidence is excluded, they must nevertheless adjudge the accused to be guilty or innocent without considering the evidence which they have heard and held to be inadmissible. This record does not disclose what comments a lawyer could make about a pending case that would be more prejudicial than the information a judge must consider as he separates the wheat from the chaff during the course of an ordinary bench trial. It is unlikely that lawyers' comments could threaten the fairness of a bench trial, and this

> record does not indicate that they have. Moreover we cannot assume that such comments would influence a judge to make unfair rulings against either the accused or the state. The suggestion that such an inference could be drawn from publicity highly critical of a judge was rejected in Pennekamp v. Florida, 328 U.S. 331, 349 (1946)."

3. Whether the speech was public

Issues such as contamination of a possible jury venire or the undermining of public confidence in the legal system have very little relevance when the allegedly prejudicial attorney speech is not directed toward or made generally available to the public. Complainant's references in her brief to supposed underminings of public confidence are either completely unsupported (Brief, p. 18, 26) or refer to cases of attorney speech lambasting the judiciary (Brief, p. 22), which is not this fact situation.

4. Whether actual prejudice resulted

Many cases turn on a factual dispute as to whether prejudice to the trial process actually did or did not occur. The U.S. Supreme Court in Gentile (p. 1055) determined that the Nevada State Bar had failed to produce

> "a single example where a defense attorney has managed by public statements to prejudice the prosecution of the State's case . . . . the absence of anecdotal or survey evidence in a much-studied area of the law is remarkable. The various bar associations and advisory commission reports which resulted in promulgation of ABA Model Rule of Professional Conduct 3.6 (1981), and other regulations of attorney speech, and sources they cite, present no convincing case for

restrictions upon the speech of defense attorneys."

5. Whether the proceeding involved is criminal

It is elementary that greater solicitude will be granted to protect Sixth Amendment concerns about the integrity of the trial process than to protect free speech where an individual's personal liberty is at stake.

The complainant is therefore left only with an argument consisting of speculation about the potential for prejudice. In support of its musings about such potential, complainant has propounded the rather troubling testimony of Judge Lee:

> "There is a danger that a judge might perceive it as a threat, give him some bad publicity, or to bad-mouth him, so to speak, around the town or around the country. And he might go ahead and decide their way, even though he might be leaning the other way, or might not be wanting to take such an extreme position that they've argued for.
>
> Or a judge, you know, I can see a judge reacting the other way, and saying, I'm not going to knuckle under them, to them, under any circumstances. And he might make a decision that might not be in the best interest of the child." (Tr. P. 188)

Even if this jaundiced view of the personal integrity of the judiciary were accurate, it would not serve as a justification to silence political speech. Respondent is not responsible for anyone's behavior except her own and cannot, consistently with due process or constitutional free speech protections, be

disciplined on the theory that a hypothetical judge might become irrationally defiant and make a decision that would hurt a child.

6. Whether the attorney speaker had reason to know of the likelihood of prejudice or was acting within Rule 3.6's "Safe Harbor" provisions

As has been noted previously, the Trial Panel's finding of a complete absence of prejudice to Judge Lee is amply supported in the record and is uncontroverted.

In part due to the extreme confusion (which still exists) on the part of attorneys representing clients involved in legal proceedings as to what could or could not be said, usually to the press, and the proliferation of caselaw holding that existing standard of degrees of likelihood of interference with a fair trial, were unconstitutionally overbroad (Chicago Council of Lawyers v. Bauer), unconstitutionally vague as applied to non-criminal non-jury trials (Herschkopf v. Snead) [sic], or otherwise unconstitutional abridgements of free speech (Matter of Keller 693 P2d 1211, 1214 (Mont. 1984)), states began adopting various versions of the ABA's Rule 3.6, which provides guidelines for lawyer speech.

Oklahoma's Rule 3.6 appears to remove a lot of the guesswork. The types of speech specifically enumerated in Rule 3.6(b) and (c), when expressed publicly, are presumed to be prejudicial to the administration of justice. Respondent is not aware of any claim that any statement in the SCAN letter can be considered to fall within any of the categories enumerated in 3.6(b) or (c).

Rule 3.6(d), also known as the "Safe Harbor" provision, specifically enumerates those kinds of information that a lawyer is free to disseminate. Rule 3.6(d)(6) permits a lawyer to state

> "a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest;"

The Comment to this portion of Rule 3.6 goes on to say that

> "there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. The public has a right to know about threats to its safety and measures aimed at assuring its security."

Aside from any issue as to whether any portion of Rule 3, including Rule 3.6(d), applies to respondent, respondent, even if she had been representing a litigant in Perry would have had a legitimate basis to express all of the concerns contained in the SCAN letter to news media, without fear of reprisal from the complainant bar association. That the audience for the SCAN letter consisted only of the litigants, their attorneys, and the judge, simply makes the argument stronger.

The United States Supreme Court considers it so important that attorneys should indeed be free to rely on such "Safe Harbor" provisions as are included in Oklahoma's Rule 3.6(d) and in the analogous Nevada rule referred to in Gentile, that it will not tolerate the sanctioning of attorney speech even where the attorney relies on "Safe Harbor" provision language so vague that a lawyer seeking to avail himself of its protections "must guess at its contours" (Gentile, p. 1048). Respondent's good faith belief in the availability of those protections is sufficient.

It may be appropriate at this point to note that the usage in the SCAN letter of variations of the term "caution" may have created a lot of misunderstanding with Judge Lee and/or with the complainant. Probably any ambiguity arises as a matter of one's perspective. From the perspective of the SCAN member signers, including respondent, notwithstanding complainant's unsupported contentions to the contrary (Brief, p. 27), the focus of the letter and the focus of their concern was obviously on the safety of the Perry child in particular and of other children in the community in general. (Tr. P. 225, p. 256 lines 19-23) Hence the letter spoke of "caution" in terms of child safety. On the other hand, it would seem that if one's focus is more on political insecurities or fear of bad press affecting one's career, then some of the various apparently non-sequitur misinterpretations of the SCAN letter's usage of the term "caution" as a "threat" or a warning that SCAN would strike out at the career of Judge Lee (Brief p. 26), become perhaps more understandable though not justified. This difference in perspective may be best exemplified by Complainant's reference in its brief at p. 18 to the Ryan Luke case. The brief appears oblivious to the urgency and concern expressed by the SCAN members, including respondent, about averting a tragedy, and re-characterizes the letter's Ryan Luke reference as intimidation. Complainant then goes on to suggest, perhaps unintentionally, that the real victims in the Ryan Luke case were the government workers involved. (Brief, p. 18)

Respondent had a good faith belief that the only effective manner in which she could warn the LeFlore County community about the behaviors of DHS and Youth Services workers, short of lacing her concerns with the media, was to place such grievances at the door of the judiciary, a body of government charged by law with protecting citizens' lives and liberty interests against highhanded or capricious official conduct operating under legal forms. Rich Hill Coal Co. v. Bashore, 7 A2d 302 (Pa. 1939)(Hdnt. 21). Even minors are constitutionally entitled to look to the judiciary for protection of their liberty interests. (Vann v. Scott,

467 F2d 1235 (7th Cir. 1972)(Hdnt 5)), though finding a means to do so can be very problematic for a minor caught up in a court proceeding in which he has no court-appointed attorney, no guardian ad litem, and no CASA. Respondent has repeatedly expressed concern not only that DHS or Youth Services improprieties could best be addressed by a judge sitting in the county where the issues arose and will be litigated, but also that

> "he's certainly in a position to know and should know about the quality of the work being done by DHS workers in his own county." (Tr. p. 282, lines 6-9) (Emphasis supplied)

Respondent submits that giving the tribunal an opportunity to have such information enhances the judge's abilities not only to assess evidence in the Perry case but also in future DHS cases in his county. Having more information at least available should add to, not subtract from, the administration of justice.

APPENDIX G
Text of Relevant Rules
and Constitutional Provisions

Oklahoma's Rules of Professional Conduct 8.4(d) and 3.6(d)(6), 5 Ok. Statues 1991, Ch. 1 App. 3-A, state as follows, respectively:

> "It is professional misconduct for a lawyer to:
> (d) engage in conduct that is prejudicial to the administration of justice"
>
> and
>
> "Notwithstanding paragraphs (a) and (b)(1-5) and (c), a lawyer involved in the investigation or litigation of a matter may state without elaboration
> . . .
>
> (6) "a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest;"

The First Amendment to the United States Constitution reads as follows:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right to the people peaceably to assemble, and to petition the Government for a redress of grievances."

Section 1 of the Fourteenth Amendment to the Constitution of the United States, reads as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."